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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The District Court's memorandum opinion of August 2, 1974 (A. 31-32), is unreported; however, there is expressly incorporated by reference in this memorandum opinion the opinion of the same Court in the case of *United States v. Fuentes*, (A. 33-53), which

opinion is reported at 379 F.Supp. 1145.[1] The Court of Appeals affirmed summarily in the present case, citing only its recent decision in *United States v. Santibanez* (A. 58). The judgment of the Court of Appeals in the present case is reported in the table appearing at 517 F.2d 1402. The opinion in *United States v. Santibanez* is published at 517 F.2d 922.[2]

JURISDICTION

The judgment of the Court of Appeals was entered August 8, 1975 (A. 58). The petition for writ of certiorari was filed September 4, 1975, and it was granted on November 11, 1975 (A. 59), with the directive that oral argument would be in tandem with *United States v. Martinez-Fuerte*, Supreme Court No. 74-1560. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] The Court of Appeals summarily affirmed *United States v. Fuentes*; see the table at 517 F.2d 1401 (C.A. 5).

[2] A rehearing en banc has been denied by the Court of Appeals in *United States v. Santibanez*; see the table at 520 F.2d 944 (C.A. 5).

2. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

3. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(1) *External boundary.* The term "external boundary," as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.
>
> (2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3)

of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide that the rights of Petitioner under the Fourth Amendment to the Constitution had not been violated when he was stopped without cause, suspicion or warrant at a permanent Border Patrol checkpoint between 65 and 90 miles from the border for the purposes of inspecting and questioning him and visually searching the lower interior of his vehicle?

II. Away from the border, do the same Fourth Amendment rules and guarantees apply to stops at Border Patrol checkpoints as apply to stops by Border Patrol roving patrols?

III. Do Fourth Amendment guarantees forbid the Border Patrol, without a warrant of any kind, from making an investigative stop of every vehicle that travels through a permanent checkpoint located many miles from the border?

STATEMENT OF THE CASE

Facts

In the early morning hours of April 28, 1974, the Petitioner's car was routinely stopped by the United States Border Patrol at the checkpoint it operates near Sarita on U.S. Highway 77 (A. 11-13). The Petitioner was driving his car on this occasion (A. 13). Border Patrol Agent De Leon, who was checking the cars stopped at the checkpoint, could see only the Petitioner in the car as he approached the stopped vehicle (A. 13, 17); but when he got near enough to see down onto the car's seats, he saw another person on the front seat and three more persons on the back seat, all lying down and pretending to be asleep (A. 13, 17, 22-24). These four passengers could not be seen from the car's window by Agent De Leon until he got "right on" the car; therefore, he would not have seen them if he had not walked over and looked down into the stopped vehicle (A. 22-24). Agent De Leon questioned the four passengers in Petitioner's car and determined they were all citizens of Mexico who did not have papers (A.

13-14); and the Petitioner was subsequently charged with illegally transporting these four aliens on this occasion (A. 4-5).

The Petitioner was arrested at the checkpoint; and he drove an officer and these four aliens to the Kingsville jail, where he and the aliens were confined (A. 29). The four aliens, after being found guilty of being in the United States illegally and receiving suspended sentences on April 29, 1974, were held in jail as material witnesses by the Government until the trial of Petitioner (A. 28).

The Border Patrol checkpoint at which Petitioner's car was stopped is about 90 miles north of Brownsville, Texas (A. 12). This is a permanent checkpoint which is operated 24 hours a day and is closed only when bad weather causes poor visibility on the highway (A. 15). It is between 65 and 90 miles from the nearest point on the Mexican border (A. 15-16).

At the time in question, all vehicles passing north through this checkpoint were being stopped and checked, except those containing persons the officers could recognize as being residents of the checkpoint area (A. 12). It was the routine at this checkpoint for an officer to approach close enough to every stopped vehicle to enable him to visually inspect its interior, unless the occupants proved to be local people who were known to the officer (A. 25-26). There were two officers working at the checkpoint and two more backed them up as "road officers" (A. 18). The Border Patrol agent did not know that the four passengers were illegal aliens until they were interrogated after Petitioner had been stopped at the checkpoint (A. 18).

U.S. Highway 77, on which the checkpoint in question is located, runs north from the Mexican

border, and between the checkpoint and the border on this highway are the cities of Brownsville, San Benito, Harlingen and Raymondville, which are fairly large cities (A. 18). There are also several small communities on this highway between the border and the checkpoint, and two entire counties–Willacy County and Cameron County–lie between these points (A. 18-19). U.S. Highway 77 runs north from the checkpoint to Kingsville, Victoria and on beyond into the interior (A. 18). A substantial amount of traffic flows north on U.S. Highway 77 and through this checkpoint (A. 19).

This checkpoint has been located at the same spot since August, 1973, but the Border Patrol had a moving checkpoint in this area for some years before that time (A. 25, 27-28). There are signs, flashing lights, traffic cones and official vehicles at this checkpoint (A. 16-17).

Trial in the District Court

In the Southern District of Texas, Brownsville Division, Petitioner was charged in a four-count Indictment with transporting the illegal aliens by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code (A. 4-5).

Before trial Petitioner moved to suppress all evidence obtained by the Government at the time of or as a result of the stopping of his automobile at the checkpoint (A. 1, 6-8), and the trial court elected to "carry it along" (A. 9-10) and heard this motion with the jury trial on the merits (A. 11, 29-30). The Petitioner entered a plea of "not guilty" to all four

counts (A. 1). At the trial no other witnesses were called by the Government except Border Patrol Agent De Leon and the four aliens who had been in Petitioner's vehicle, and the testimony of these witnesses was admitted into evidence despite Petitioner's objections and his motion to suppress same (R., vol. II, 7-147, 258). The motion to suppress was overruled when the Government rested its case (A. 28-29). The motion was renewed at the close of all the testimony and again was overruled (A. 29-30). The jury found the Petitioner "guilty" on all four counts (A. 2). He was sentenced to concurrent terms of two years of imprisonment on counts 1 and 2, with all but six months of the sentence suspended in favor of three years of probation. He was also sentenced to concurrent terms of two years of imprisonment on counts 3 and 4, to run consecutively with the sentence imposed on counts 1 and 2; but the sentence on counts 3 and 4 was suspended in favor of three years of probation (A. 54-55).

Court of Appeals

An appeal was taken to the United States Court of Appeals for the Fifth Circuit (A. 3, 56). Thereafter, the Court of Appeals, sua sponte, transferred the case to its Summary Calendar for disposition without oral argument (A. 57) and summarily affirmed the conviction (A. 58).

SUMMARY OF ARGUMENT

I.

The Ninth Circuit in *United States v. Martinez-Fuerte*, 514 F.2d 308 (C.A. 9), certiorari granted October 6, 1975, was correct when it held that "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable" (*id.* at 322). The Fifth Circuit was wrong when it determined that Petitioner's constitutional rights were not violated by the Border Patrol when he was stopped at the checkpoint because the stop was not sufficiently intrusive. Judicial precedents support the holding of the Ninth Circuit.

A. There is a constitutional guarantee that travelers lawfully within this country are entitled to use the public highways without interruption or search unless there is a probable cause for a search. *Carroll v. United States*, 267 U.S. 132, 154. But despite the cases which support this guarantee, it was previously claimed that the Border Patrol could, away from the border, stop a motorist, question him and search his vehicle for aliens, without warrant, reasonable suspicion or probable cause. A large portion of this claimed exception to the free-passage doctrine was refuted by the cases of *Almeida-Sanchez v. United States*, 413 U.S. 266, *United States v. Brignoni-Ponce*, 95 S.Ct. 2574, and *United States v. Ortiz*, 95 S.Ct. 2585; but these cases did not resolve the question of whether the Border Patrol can stop a motorist, question him and visually search the interior of his vehicle, without warrant, cause or suspicion, at a permanent interior checkpoint. However,

there would appear to be no significant distinction between stops by roving patrols, which were held to be unlawful without reasonable suspicion, and stops at checkpoints, except perhaps that the operations of the checkpoints constitute a greater impediment to the free passage of travelers than do roving-patrol operations.

B. While the Fourth Amendment forbids only "unreasonable" searches and seizures, in determining whether a search and seizure is "unreasonable" the starting point is whether the officer had a valid warrant, as there are only a few specifically established and well-delineated exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347. One of the most important exceptions to the warrant requirement involves a search made incident to a lawful arrest. When Petitioner was stopped at the Sarita checkpoint, his constitutional rights were intruded upon in the following ways: (1) by the stop, which took him into official custody (or seized him and his car); (2) by the agent conducting a visual search of his car's interior; and (3) by being questioned. Since these unlawful intrusions were accomplished before the formal arrest of Petitioner, the arrest could not validate the prior intrusions.

Another exception to the warrant requirement permits the searching of a vehicle when the acting officer has facts or information constituting probable cause to believe that an offense involving the particular vehicles was being committed. But in the case of a roving-patrol stop for an immigration investigation, only reasonable suspicion is required. The routine checkpoint stop, however, is made without either probable cause or reasonable suspicion concerning the particular vehicle being halted.

In the case involving the narrow field of commercial enterprises that are federally licensed, such as dealing in guns, a limited inspection can be made without a warrant or specific facts justifying the intrusion. But this exception to the warrant requirement is based upon the proposition that a man who elects to engage in such a business which is closely regulated and licensed must accept the burdens with the benefits. Obviously, this exception has no application to the interior checkpoints where intrusions are made upon all travelers who are motoring north.

The last exception to the warrant requirement needing consideration is the "stop and frisk" situation of *Terry v. Ohio*, 392 U.S. 1. It has been held that if an officer conducts such a "stop and frisk" of a person in a street encounter, the officer must have first been aware of specific facts which would lead a reasonable man to believe that such actions are appropriate. This reasoning was extended to the situation involving a roving patrol stop for an immigration investigation. However, the cases in this area strongly support the proposition that a routine checkpoint intrusion is unlawful because it is done without any specific facts concerning the particular vehicle that is stopped.

C. Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, 275-285, suggested that roving patrol stops could be authorized by obtaining an area-type warrant based upon supporting information relating to criminal activity in the area and other factors, rather than upon information concerning a particular vehicle. Such a procedure would be an expansion of that approved in the administrative inspection situation presented in

Camara v. Municipal Court, 387 U.S. 523. Since the Border Patrol in the present case had not obtained a warrant, these opinions can not be used to justify the intrusions of Petitioner's rights at the checkpoint because neither opinion suggested that a warrant could be completely excused.

II.

The Government has in other cases involving Border Patrol stops attempted to justify the intrusions simply on the ground that they were "reasonable." Applying the "reasonableness" test requires the balancing of the magnitude of the intrusions involved against the public need for the Government to accomplish the intrusions.

A. When a motorist comes within sight of agents at the checkpoint, he is immediately deprived of his right to free passage for he then comes within the custody and control of such agent. Should he decline to stop at the checkpoint, he will be pursued and captured. Also, the right of personal secrecy and privacy is violated at the checkpoint. The motorist has an area in the lower portion of his vehicle which can not be seen from the outside when traveling at highway or even lesser speeds. This area of vehicular privacy is violated by the checkpoint procedures. The verbal probes at the checkpoint further violate this basic right.

Travelers also have a right to be free from arbitrary interference and regimentation by the Government. The continuous and massive intrusions at the checkpoints instinctively repel free people. Though a checkpoint stop may not be as frightening to the individual as a

stop by a roving patrol, it is in reality considerably more dangerous because, at least at the Sarita checkpoint where Petitioner was stopped, it takes place in the middle of a major highway where cars coming up from the rear are traveling at highway speeds. A drunk driver and a checkpoint are a dangerous mixture.

In considering the magnitude of the checkpoint intrusions, it should be kept in mind that the residents of the border area must face them again and again. A roving-patrol stop may be an isolated experience for the individual who is stopped, but the checkpoint stop comes on every occasion that a motorist leaves the border area. It is specious to isolate one checkpoint stop and say that it is of little consequence when millions of such intrusions occur each year.

A large portion of the population of the Lower Rio Grande Valley of Texas, who must go through the Sarita checkpoint or some other checkpoint in order to travel north, have some of the characteristics which could be deemed "suspicious" under the opinion in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, 2582–they are of Mexican ancestry and poorly groomed. The checkpoint is a particularly unpleasant experience for this large segment of the lawful residents of this area since such characteristics can earn them a prolonged investigation at the checkpoint. On the other hand, people who are wealthy enough to buy or rent an airplane need never even encounter a checkpoint; it is only the poor and middle classes which have no alternative but to pass through them if they travel north from the border. "Field interrogations" are a major source of friction between police and minority groups, and the checkpoints clearly fall into this category.

B. If there are in fact 10 to 12 million illegal aliens now in this country, with 85 percent having come from Mexico, this would strongly indicate that the checkpoints, which allegedly are the backbone of the Border Patrol's enforcement efforts, are not effective and not indispensable. Other statistics confirm this conclusion, such as the fact that during an eight-day period at the San Clemente checkpoint only about 0.12 percent of the vehicles encountered were found to have illegal aliens.

The Border Patrol has not been provided with sufficient men and money to do the job it has been assigned, so it is not surprising that it has chosen to employ these checkpoints. Though the problem of illegal aliens may become substantial, this nation has effectively met greater challenges when it has decided to pay the price in terms of money and materials. The border can be virtually sealed at the Rio Grande and other physical boundaries if this nation decides this objective is worth the cost.

There are other means which could be authorized that would be relatively inexpensive but which could greatly alleviate or perhaps completely solve the illegal alien problem. The most promising of these would be to impose criminal sanctions on the employers of illegal aliens. How can we ever expect to control a problem when we do not even punish the people who create it—the employers of illegal aliens? It would also be beneficial to impound and forfeit vehicles that are used to knowingly transport illegal aliens.

The argument that a particular police procedure is absolutely necessary for law enforcement is always raised whenever such procedure is attacked on consti-

tutional grounds. The Border Patrol has other means of accomplishing its mission besides checkpoints, and there is no evidence that checkpoints well serve the national interests.

C. In the balance between the good and the evil of checkpoints, one extremely important consideration is their great and inherent potential for political abuses. The checkpoints are Orwellian devices which might be employed by a domineering political party, bent on perpetuating itself in power, to manipulate and oppress all or a portion of the public. If held to be constitutional in the present case, there would be no logical, reasonable and fair way to restrict the checkpoints to the south 100 miles of this nation. Also, if such devices can constitutionally be utilized to apprehend illegal aliens, there will be an attempt ~~to~~ by other police organizations to employ them in other law-enforcement areas. In this way our nation could slowly but surely become infested with checkpoints to control various types of crime, and this would greatly impair our freedom. If the illegal alien problem must be eliminated, we should do so with money and materials; the checkpoints are too high a price to pay. They should be eliminated before they spread.

ARGUMENT

I.

THE INTRUSIONS OF THE BORDER PATROL AT THE SARITA CHECKPOINT VIOLATED PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

With an exhaustive analysis, the United States Court of Appeals for the Ninth Circuit held in *United States*

v. Martinez-Fuerte, 514 F.2d 308 (C.A. 9), certiorari granted October 6, 1975, that with or without an area inspection warrant the Border Patrol must have a founded suspicion in order to stop a vehicle at a permanent interior checkpoint. But in summarily affirming the conviction of Petitioner, the Fifth Circuit cited only its recent opinion in *United States v. Santibanez*, 517 F.2d 922 (C.A. 5), which held without elaboration that there was no constitutional dereliction in stopping a vehicle at a permanent interior checkpoint because "[s]uch a stop is considerably less intrusive than a search" (*id.* at 923).[3] It is submitted that the Fifth Circuit erred in the *Santibanez* case (and also in Petitioner's case) while wholly failing to address itself to important constitutional considerations. On the other hand, the great weight of reason supports the Ninth Circuit's conclusion that "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable" (*United States v. Martinez-Fuerte, supra*, 514 F.2d at 322). Judicial decisions in this and related areas buttress the holding of the Ninth Circuit.

[3]The Tenth Circuit has also upheld the warrantless checkpoint procedures. *United States v. Bowman*, 487 F.2d 1229 (C.A. 10).

A. Travelers within this nation have the constitutional right to free passage without interruption or search by officers possessing neither a warrant nor reasonable grounds for suspicion.

Freedom to move within the interior of the United States is a constitutional right of its citizens. *Shapiro v. Thompson*, 394 U.S. 618; *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35. Furthermore, in the landmark opinion of *Carroll v. United States*, 267 U.S. 132, 154, it was proclaimed that travelers lawfully within this country are entitled to use the public highways without interruption or search unless there is a probable cause for a search. A long line of subsequent cases said that, at the very least, there must be probable cause in order to stop and search an automobile. *E.g., Chambers v. Maroney*, 399 U.S. 42; *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216; *Brinegar v. United States*, 338 U.S. 160.

Despite the *Carroll* case and those following it, the Border Patrol has previously taken the position that it could stop and search, by roving patrol or by checkpoint, any and every vehicle found within 100 air miles of the border, without warrant, cause or suspicion, basing this asserted autority on 8 U.S.C. 1357(a) and the regulation pertaining thereto, 8 C.F.R. 287.1. In effect, this claimed authority constituted an exception to the free-passage doctrine and amended the famous language of Mr. Chief Justice Taft found in *Carroll v. United States, supra*, 267 U.S. at 154, as follows:

> But those lawfully within the country, entitled to use the public highways, have a right to free

passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise, [or unless such travelers pass within 100 air miles of the Mexican border over public highways where relatively high-ranking officials of the Border Patrol have decided to install highway checkpoints or operate roving patrols.]

In *Almeida-Sanchez v. United States*, 413 U.S. 266, it was determined that at least a portion of this claimed exception to the free-passage doctrine would not be recognized. The *Almeida-Sanchez* case considered a stop and extensive search by a roving patrol; and two years later there came *United States v. Brignoni-Ponce*, 95 S.Ct. 2574, which involved a stop and questioning by a roving patrol, and its "traveling" companion, *United States v. Ortiz*, 95 S.Ct. 2585, which involved a stop and search of a car's trunk at a checkpoint. These two more recent cases also refused to find that the Government's claimed exception limb had been lawfully grafted on the free-passage tree. However, both the *Brignoni-Ponce* and the *Ortiz* cases left open the question, presented herein, of whether Border Patrol officers may lawfully stop a motorist, question him and visually search the interior of his vehicle, without warrant, cause or suspicion, at an established checkpoint many miles from the border.

It would certainly appear, however, that there is no significant distinction between, on the one hand, stops by roving patrols for questioning, without warrant or reasonable suspicion, which were held to be unlawful in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574; and, on the other hand, stops at checkpoints for

questioning, also without warrant or reasonable suspicion. If there is such a distinction, it is that the operations of checkpoints constitute much greater impediments to traffic than the operations of roving patrols. Every car that passes a checkpoint comes into the custody and control of the Border Patrol, while a roving patrol stops only a very limited portion of the total traffic on a particular road. At the San Clemente checkpoint, involved in *United States v. Ortiz, supra*, 95 S.Ct. 2585, over 10 million cars a year encounter the Border Patrol intrusions (see *id.* at 2587). In this regard, it might also be noted that the word "checkpoint" is a Border Patrol euphemism for a roadblock,[4] and the checkpoints effectively do just that—block roads with signs, traffic cones, flashing lights, uniformed officers and official vehicles (*ibid.* and A. 16-17). There can be no doubt that checkpoints are completely incompatible with the free-passage doctrine of the *Carroll* case.

B. The Border Patrol checkpoint operations do not come within any recognized exception to the warrant requirement of the Fourth Amendment.

It is clear that the language of the Fourth Amendment forbids only "unreasonable" searches and

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[4]Since the courts, in most instances, employ the word "checkpoint" to these police devices, the terms will be used herein, although the word "roadblock" seems to be more descriptive. Unless otherwise indicated, however, "checkpoint" will refer herein to a permanent checkpoint situated many miles from the border and the functional equivalents of the border.

seizures, but it is not so clear how to determine what is "unreasonable" in a specific situation. Since the wording of this Amendment passes smoothly from the prohibition of such unreasonable searches and seizures into an enumeration of the requirements for a warrant, it is not surprising that there has been found a strong link between the question of reasonableness and the requirement for a valid warrant. Thus the presence of or lack of a judicial warrant is almost always the starting point in considering any Fourth Amendment problem because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (*Katz v. United States*, 389 U.S. 347, 357, footnotes omitted). In the instant case there was no warrant, valid or otherwise, so the inquiry turns to whether the operations of the Sarita checkpoint, as inflicted on Petitioner, fall within the few established exceptions to the warrant requirement.

One of the most important exceptions to the requirement of a warrant involves a search or intrusion made incidential to a lawful arrest.[5] But this arrest

[5] The arrest exception to the warrant requirement may be the most frequently invoked of the specifically recognized exceptions. The scope of this exception was tested in the case of *Schmerber v. California*, 384 U.S. 757, involving the removal of a blood sample from a person under a lawful arrest. And because in that instance there was an intrusion beyond the body's surface, it was also required that the officer who directed the blood be taken have reason to believe that there was an emergency in which a delay to obtain a warrant could lead to destruction of evidence. This further requirement was satisfied by the officer having good reason to believe that the man was intoxicated and that, therefore, the percentage of alcohol in his blood was diminishing as time passed. It was also indicated that the blood had to be drawn in a medically sound and safe manner. *Id.* at 769-772.

exception has significant limitations, one being that if the arrest is not itself lawful then it can not support a search incidential thereto. *Beck v. Ohio*, 379 U.S. 89. Consequently, an originally defective arrest can not be justified by what a subsequent search discloses. *Henry v. United States*, 361 U.S. 98. In the *Henry* case FBI agents observed two men loading a car under what the agents considered suspicious circumstances. When the car drove away, the agents followed it, stopped it and arrested Henry after overhearing a request made by him to his companion. The Court in the *Henry* opinion indicated that the stopping of the car was an arrest and that it must therefore be justified on the same basis as any other warrantless arrest; hence stolen property found in Henry's car after his arrest could not be used to establish the probable cause required to authorize the arrest (*id.* at 103-104).[6]

A correlative limitation of the arrest exception to the warrant requirement is that a preceding search or intrusion can not be validated by a subsequent arrest. *Sibron v. New York*, 392 U.S. 40; *Johnson v. United States*, 333 U.S. 10. In the present case the Border Patrol intrusions at the checkpoint, prior to Petitioner's arrest, were threefold. First, the Petitioner was stopped and taken under Border Patrol control, which can also be characterized as a seizure of the person and/or automobile. *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, 2578-2579.[7] Second, the Border Patrol

[6] But *United States v. Ortiz, supra*, 95 S.Ct. 2585, indicated that a stop at a checkpoint is not an arrest; and *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, also indicated that a roving-patrol stop was only a brief detention short of traditional arrest.

[7] Within the meaning of the Fourth Amendment's language, an automobile is considered an "effect." *Cady v. Dombrowski*, 413 U.S. 433, 439.

agent conducted a visual inspection of the lower interior of Petitioner's vehicle. Since this was an area that the agent would not have been able to see if he had not first stopped the car and approached close enough to look down onto its seats, this part of the procedure can properly be characterized as a search. *United States v. Fuentes*, 379 F.Supp. 1145 (S.D. Tex.) *aff'd mem.*, 517 F.2d 1401 (C.A. 5);[8] *cf. State of Texas v. Gonzales*, 388 F.2d 145 (C.A. 5). Third, the agent interrogated the Petitioner and the other passengers in the car.[9] It was only when the Border Patrol agent had accomplished these three checkpoint intrusions of a stop, a search and an interrogation that the arrests of Petitioner and his alien passengers were made. There-

[8]Considering a checkpoint stop and search, Judge Reynaldo G. Garza, who presided at Petitioner's trial, said in *United States v. Fuentes*, 379 F.Supp. 1145 (S.D. Tex.), *aff'd mem.*, 517 F.2d 1401 (C.A. 5), as follows:

> From the onset, this Court wishes to make clear that it is proceeding on the theory that the initial stop was made for the purpose of visually inspecting the passenger section of the car and ascertaining the citizenship of the occupants, pursuant to 8 U.S.C. 1357. *Thus, this Court must pass on the legality under the Fourth Amendment of not one, but two searches: the initial inspection and the subsequent search of the trunk* (*id.* at 1147-1148, emphasis added).

[9]The record clearly reflects that the Border Patrol agent conducted the preliminary interrogation of Petitioner and determined that the passengers were aliens with "no papers" without first warning them of their constitutional rights concerning self-incrimination (A. 13-14). This in itself would seem to be an unlawful procedure in view of *Orozco v. Texas*, 394 U.S. 324, 327, and *Miranda v. Arizona*, 384 U.S. 436, 477, which hold that an individual should be given the required warning when he has been deprived of his freedom of action in any significant way. Obviously, even at the time of this preliminary interrogation the Petitioner and his passengers had been deprived of their freedom to continue on their journey.

fore, Petitioner's arrest could in no way justify the Border Patrol's actions which are here in question.

Another well-defined exception to the warrant requirement for search and seizure is based on the great mobility of the motor vehicle and the problems such mobility creates for law enforcement. This exception provides generally that if it is not practicable to obtain a warrant and if an officer has facts or information constituting reasonable or probable cause to believe that he will find the instrumentality of a crime or evidence pertaining to a crime in a particular vehicle, then the officer may stop and search the vehicle under suspicion. *Chambers v. Maroney, supra*, 399 U.S. 42; *Brinegar v. United States, supra*, 338 U.S. 160; *Carroll v. United States, supra*, 267 U.S. 132. The recent case of *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, extended this exception somewhat in the situation where a roving patrol stops a vehicle to ascertain whether it contains illegal aliens, by holding that Border Patrol officers must have only reasonable suspicion, rather than probable cause, for such a stop. However, the decisions which deal with this exception to the warrant clause do not support the Border Patrol's routine checkpoint intrusions, including those inflicted upon Petitioner, for the reason that these intrusions are made without any prior information or facts which could evoke even a reasonable suspicion about a particular vehicle.

One very limited area in which neither a warrant nor facts justifying the specific intrusion may be required is an inspection, under proper statutory authority, of a commercial enterprise that is federally regulated and licensed. *United States v. Biswell*, 406 U.S. 311;

Colonnade Catering Corp. v. United States, 397 U.S. 72. But this narrow exception is based upon the proposition that there can reasonably be a specific and detailed inspection scheme, carefully limited in time, place and scope, imposed upon a business that has traditionally been closely regulated and licensed by the Government because those who choose to engage therein accept the bitter burdens along with the sweet rewards which accompany an activity such as dealing in liquor (*Colonnade* case) or in firearms (*Biswell* case). Obviously, one who elects to engage in such a business as selling firearms has voluntarily stepped into a sphere separate and apart from the normal and customary activities of the average citizen; and he knowingly submits himself to pervasive, well-defined and specific governmental control. There is no constitutional doctrine guaranteeing freedom for dealing in firearms or the like; but, as seen hereinabove, there is a doctrine guaranteeing the right of travelers to free passage over public highways without interruption or search.

It should be apparent that the limited rule of the licensing cases do not apply to the broad stream of citizenry which flows each hour over roads where the Border Patrol conducts its extensive operations, yet in *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, the Government contended that the licensing cases could justify a roving stop and search (*id.* at 270-272). Surely, Mr. Justice Powell was correct when, in his concurring opinion in *Almeida-Sanchez*, he said, "Colonnade and Biswell cannot fairly be read to cover cases of the present type" (*id.* at 281). Neither can these cases be fairly read to cover the multitude of intrusions on the rights of the traveling public which the

checkpoint operations accomplish every hour of every day.

The last exception to the warrant requirement calling for consideration is found in the street encounter or "stop and frisk" situation. *Terry v. Ohio*, 392 U.S. 1, held that police conduct involved in a street stop and pat-down for weapons, even though stopping short of a "technical arrest" ~~or~~ a "full-blown search," was, nevertheless, subject to Fourth Amendment restraints (*id.* at 19). The acting officer, it was said, must be aware of specific and articulable facts which, taken with rational inferences therefrom, reasonably warrant the particular intrusions; and in making such assessment the facts available to the acting officer at the moment of seizure or search must be such as would cause a reasonably cautious man to believe that the action taken was appropriate (*id.* at 21-22). It is apparent from the *Terry* case and from the later case of *Adams v. Williams*, 407 U.S. 143, that the validity of an officer's action in this situation must be justified from its inception—an initial "stop" must be justified if a subsequent "frisk" is to be upheld.

The reasoning of *Terry v. Ohio, supra*, 392 U.S. 1, and *Adams v. Williams, supra*, 407 U.S. 143, was applied in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, the Court holding therein that a roving patrol of the Border Patrol must have reasonable suspicion to justify the stop of a moving vehicle and the interrogation of its occupants. But not only does this line of cases not support the procedures practiced by the Border Patrol at its checkpoints, it can fairly be said that these decisions are strong authority for the conclusion that checkpoint stops and subsequent

intrusions are illegal because such stops are routinely inflicted on every car which comes down the pike, with no articulable facts whatsoever known about a particular vehicle before it gets to the blinking lights.

C. The reasoning of *Camara v. Municipal Court* gives no support to warrantless checkpoint intrusions.

In *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, Mr. Justice Powell said, in his concurring opinion (*id.* at 275-285), that roving-patrol stops and searches would be constitutionally permissible if an area-type warrant were obtained in advance; and he suggested that such a warrant could be based upon supporting information regarding the extent of illegal activity and other factors found in the area of operations, rather than upon information concerning a particular vehicle (*id.* at 283-285). Mr. Justice White, speaking for the four dissenters in this case, agreed that such a warrant would satisfy Fourth Amendment safeguards (*id.* at 288). This procedure suggested by Mr. Justice Powell would be an expansion of the doctrine formulated in *Camara v. Municipal Court*, 387 U.S. 523.

The *Camara* decision, which involved an administrative inspection for violations of a city Housing Code, advanced the proposition that in the narrow field of such administrative inspections the requirement of probable cause could be modified somewhat as a prerequisite for obtaining a warrant. It was indicated that instead of requiring specific knowledge about the condition of the particular structure to be inspected, such a warrant could be based on such factors as the

nature of the building or the condition of the entire area (*id.* at 538-539). The factors authorizing the relaxation of the probable cause requirement were: (1) a long history of judicial and public acceptance; (2) the likelihood that no other method could protect the public interests against the dangerous conditions which such administrative inspections could discover; and (3) the limited invasion of privacy which such administrative inspections, not aimed at discovery of evidence of crime, entail (*id.* at 536-537).

But neither the *Camara* opinion nor Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* suggest in any way that the warrant requirement can be completely ignored. It can be noted that the specific holding in the *Camara* case was that the defendant could not constitutionally be convicted for refusing entry to a building inspector who failed to obtain a warrant. *Frank v. Maryland*, 359 U.S. 360, to the extent that it sanctioned *warrantless* inspections, was thereby overruled (387 U.S. 528). Therefore, in the present case the fact that the Border Patrol had not seen fit to obtain a warrant authorizing the operation of the Sarita checkpoint precludes reliance on these authorities to attempt to justify the invasions of Petitioner's constitutional rights.

II.

AT THE CHECKPOINT THE INDIVIDUAL'S INTERESTS OUTWEIGH THOSE OF THE GOVERNMENT.

Although the official intrusions into individual privacy, which routinely and massively occur at Border

Patrol checkpoints operated without valid warrants, are not sanctioned by any recognized exception to the warrant requirement, in *United States v. Brignoni-Ponce, supra,* 95 S.Ct. 2574, the Government sought to justify a roving patrol stop and interrogation without warrant or probable cause simply on the ground that the intrusions were "reasonable" under the Fourth Amendment when balanced against the governmental benefits derived from such operations.[10] The Court in the *Brignoni-Ponce* case did not accept this contention, but it did say that only reasonable suspicion, rather than probable cause, was required for such action (*id.* at 2580-2582). In the *Martinez-Fuerte* case, which is set for argument in tandem with the present case, the Government, in attempting to justify all checkpoint intrusions, with or without a warrant, has again heavily relied upon a balance between the public interest and the individual's right to be free from official interference,[11] this despite the obvious difficulty in finding significant distinctions between the operations of the checkpoints and the operations of the roving patrols. It therefore appears that if the checkpoint procedures without valid warrants are to be upheld it will be on the basis of a "reasonable," but new, exception chiseled from the hard shield of the Fourth Amendment. Perhaps it is desirable that, in applying the Fourth Amendment, consideration of the intrusions be balanced against the public needs. But if too many chunks are chiseled from this shield, it will soon cease to shield

[10]See *United States v. Brignoni-Ponce,* Supreme Court No. 74-114, Brief for the United States at 22-31.

[11]See *United States v. Martinez-Fuerte,* Supreme Court No. 74-1560, Brief for the United States at 16-42.

us; and it might well be that great public needs are much easier imagined than refuted.

Nevertheless, the "reasonableness" approach may be alive and well; hence the difficult balancing of private rights against governmental needs must be considered in the context of the present case. The touchstone of this approach was well and succinctly described by Mr. Justice White, speaking for the Court, in *Camara v. Municipal Court, supra,* 387 U.S. 523, as follows:

> Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails (*id.* at 536-537).

While a balance can test both sides simultaneously, herein the competing interests must be weighed in sequence.

A. The checkpoint procedures are incompatible with the personal freedoms guaranteed citizens of this nation.

As noted at the beginning of Part I of this argument, the Fifth Circuit, after the *Brignoni-Ponce* and *Ortiz* decisions were handed down, affirmed the present case and *United States v. Santibanez, supra,* 517 F.2d 922, on the ground that "[s]uch a stop is considerably less intrusive than a search" (*id.* at 923). So the nature and extent of the intrusions which the Government inflicted on Petitioner and other travelers must be considered in some detail.

The instrusions in the present case occurred in the hours of darkness on April 28, 1974, when Petitioner,

proceeding in his car north on a major highway in southern Texas, was confronted by the Border Patrol with signs, flashing lights, traffic cones, official vehicles and a uniformed agent (A. 16-17). Petitioner was forced to a complete stop,[12] and the Border Patrol agent approached close enough to Petitioner's vehicle to be able to see down into its lower interior and questioned Petitioner about his citizenship. Then, upon discovery of the four aliens, they too were asked about their citizenship (A. 13-14). Though the *Santibanez* opinion indicates that there is no search involved in the initial checkpoint intrusions, it is contended by Petitioner, as stated in Part I B of this argument, that when he came into this governmental traffic net, he was forthwith subjected to the three distinct intrusions of a stop, which amounted to taking him into official custody and control, an initial visual search[13] (and perhaps, as may

[12]Evidently the Sarita checkpoint permitted no "waive throughs" or "fleeting stops" as is attributed to its San Clemente cousin in *United States v. Martinez-Fuerte, supra,* 514 F.2d at 313, the only exception being local residents who endured this checkpoint so frequently that they could readily be recognized by an officer on duty (A. 12).

[13]The visual search of Petitioner's vehicle can not be justified on the basis of the "plain view" doctrine. One of the reasons cars are stopped and approached by an agent at the Sarita checkpoint is to afford the agent an advantageous view into the vehicle which he would not have had except for the stop (A. 25-26). In *Coolidge v. New Hampshire,* 403 U.S. 443, it was said regarding the "plain view" doctrine:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to indentify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal (*id.* at 465).

have occurred in *Santibanez*, an olfactory search as well) and an initial interrogation.

By virtue of these intrusions Petitioner, and those preceding and following him through such checkpoints, have had invaded several important aspects of their constitutional guarantees. For one, when a motorist comes within sight of the agents at a checkpoint, he is immediately deprived of the right to free passage and movement which was described and examined in Part I A of this argument. He is in the custody and control of the agents on duty at the checkpoint from first sighting until such time as he is given permission to leave, which may or may not be a short interlude; and if he attempts to escape this arbitrary detention by declining to stop, he will surely be pursued and captured if possible.

Further, the right of personal secrecy and privacy is violated at the checkpoint. The ordinary passenger car is not fully enclosed; but when traveling at highway or even lesser speeds, it effectively furnishes a good deal of privacy to its occupants, especially in the lower interior below window level. It can be anticipated that some people will dress in a more casual, more revealing, and perhaps less socially acceptable attire when making an extended motor trip than they would dress if they were, for example, going shopping. Also, it is reasonable to assume that some travelers have items in the lower portions of their vehicles which, though legal, they would prefer not to have exposed to one or more strangers. There can be no doubt that the Fourth Amendment protects individual privacy against unreasonable intrusions by federal agents, (*Katz v. United States, supra,* 389 U.S. 347); yet at the checkpoint the

traveler is, without warrant or justifying suspicion, stopped, peered at and questioned.[14] And if an unfortunate motorist is deemed by the Border Patrol agent to "break the pattern" (which might mean anything the agent on duty at the time wants it to mean) the motorist is further favored with a barrage of rather personal verbal probes – "Where are you coming from? Where are you going? Why are you going there? Where do you live? Where do you work? Where were your born?" may be just the prologue.

In addition, the traveler has the right to be free from arbitrary governmental interference and regimentation. Free people are instinctively repelled and irritated with such continuous and massive intrustions by the Government on the general traveling public as the checkpoints effect. It may take only a few seconds to clear a checkpoint after you get to where the inspecting agent stands; but on a day of moderately heavy traffic how long do you have to wait for the opportunity to convince the agent that you are, yes truly, a United States citizen?

The point was made in *United States v. Ortiz, supra,* 95 S.Ct. 2585, that a checkpoint stop is less likely to frighten a motorist than is a stop by a roving patrol (*id.* at 2587-2588). But it is submitted that if a checkpoint stop is somewhat less frightening, it is also considerably more dangerous than a roving-patrol stop because a roving-patrol stop will not be made in the middle of a major highway. At least at the Sarita checkpoint involved in the present case and other checkpoints

[14] *McDonald v. United States,* 335 U.S. 451, stated:

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted (*id.* at 455-456).

operated like it, the traveler is forced to expose himself to a serious danger which he would not otherwise encounter, to-wit: He is stationary in the middle of the north-bound lane while traffic is coming up from the rear at such highway speeds as are typically employed in the Texas ranch country. This means that in order to avoid a disaster the oncoming motorist must see the Border Patrol's checkpoint signals and obey them with some promptness. It is not here suggested that a normal, sober driver would have difficulty performing these procedures.[15] However, the problem is that periodically a driver comes along who does not possess both characteristics, especially sobriety. This danger is particularly present during the hours of darkness when the ability to see is lessened, always by darkness and sometimes by alcohol.

Petitioner submits that to allow checkpoint operations like the one near Sarita to continue will surely doom a number of travelers and Border Patrol agents to untimely deaths and serious injuries. Perhaps such tragic checkpoint accidents have already taken place; but if they have not, it is certain to be only a matter of time until a drunk barrels into a checkpoint, scattering cars and agents like tenpins. The same accident could also easily be caused by brake failure, especially if the vehicle is one of the large trailer trucks which regularly

[15] The danger described is present even when traffic is light and the weather good. Apparently, the Border Patrol recognizes that the checkpoints are hazardous to motorists because the checkpoints are not operated when the weather is bad or when traffic becomes extremely heavy. See *United States v. Martinez-Fuerte, supra,* 514 F.2d at 313. At the Sarita checkpoint the north-bound traffic, which is being stopped, is separated from the south-bound traffic, which is not being stopped, only by a line of traffic cones (A. 16-17).

transport citrus and other farm products out of the Lower Rio Grande Valley of Texas. Such a highway calamity would almost be certain to cause multiple deaths. Since the danger is so obvious, there can be little doubt that it generates considerable apprehension in the prudent motorists, who, while at the checkpoint, anxiously look into their mirrors to watch the vehicles coming up from the rear. Presumably, Border Patrol agents get paid for exposing themselves to this and other hazards; but for the travelers this exposure and the accompanying apprehension is entirely gratuitous.

In considering the magnitude of these intrusions, it should be kept in mind that they are inflicted again and again on those who reside in the Lower Rio Grande Valley and in the other areas along the Mexican border. The locations of the Border Patrol checkpoints north of the Valley has effectively insured that motorists going north from this border area must encounter a checkpoint.[16] In the case of a roving patrol stop, the experience is probably isolated and perhaps even unique for an innocent motorist. But the checkpoints must be faced repeatedly by the residents of the Lower Rio Grande Valley. For many, it is several times each year; for others it is several times each month; and for still others it is more than once a week.[17] The resentment generated by the checkpoint intrusions is quite

[16]There are three checkpoints located in strategic positions which cover vehicular traffic going north from the Lower Rio Grande Valley. See *United States v. Fuentes, supra,* 379 F.Supp. 1145 (S.D. Tex.), *aff'd mem.*, 517 F.2d 1401 (C.A. 5).

[17]Account should also be taken of the people who, because they reside in the immediate vicinity of the checkpoint, must pass it almost daily (A. 12, 26).

naturally greatly magnified by repeated exposure to them. In considering the balance between the detriment to individual rights and the needs of law enforcement, it would be specious to argue that one isolated checkpoint intrusion is of little consequence, when the real consideration should be the evils occasioned by many millions of such encounters each year.

The *Brignoni-Ponce* opinion held that Mexican ancestry is at least a relevant factor in forming a reasonable suspicion that a particular individual may be an alien, and the opinion also observed that the Government had pointed out that trained officers could recognize the characteristic appearances of persons who live in Mexico by relying on such factors as the mode of dress and haircut. *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2582. In other words, the usual illegal Mexican alien has the dark hair, eyes and skin typical of a great majority of Mexican citizens; and being, almost by definition, poor, the illegal alien is therefore poorly groomed and poorly clothed. And what of the residents of the Lower Rio Grande Valley who must pass through one of the checkpoints in order to travel into the interior of our nation? The McAllen-Brownsville area has a combined population of about 320,000.[18] A recent article in a national magazine reported that nearly 80 percent of the population of Hidalgo County, the county in which McAllen is located, is Spanish-speaking and that 74 percent of the adults in the county have not completed more than the seventh grade.[19] It is thus apparent that

[18]See *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2581. The Lower Rio Grande Valley consists primarily of the area between McAllen and Brownsville.

[19]See *Newsweek*, November 24, 1975, p. 21.

a large portion of the residents of the Lower Rio Grande Valley likewise have dark hair, skin and eyes since their not-too-distant ancestors immigrated from Mexico. Unfortunately, many of them are also so poor that they must wear old clothes, drive old cars and get haircuts infrequently. And this large multitude, which may number in the hundreds of thousands of Valley residents, most of them native born, must face a checkpoint with the same "suspicious" physical and grooming characteristics as the illegal Mexican aliens possess, knowing full well that such an appearance, though innocent, can precipitate an extremely unpleasant and prolonged investigation at the checkpoint to which a more prosperous citizen with light coloring would not likely be subjected.

Obviously, the intrusions of the checkpoints are not equal for all the citizens who are forced to pass through them; yet the Constitution forbids the Federal Government and its agents from discriminating against individuals on the basis of race. *Cf. Bolling v. Sharpe*, 347 U.S. 497. Furthermore, it was recognized in *Terry v. Ohio, supra*, 392 U.S. at 14 n. 11,[20] that "field interrogations" are in many communities a major source of friction between the police and minority groups. The checkpoint operations unquestionably are "field interrogations," and it seems well within the realm of possibility that they give rise to such friction.

In considering the inequities of these checkpoints, it should be noted also that the wealthy are often not confronted at all by a checkpoint on their trips to the

[20]The Court quotes therein the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* (1967).

north. Anyone who can afford to buy or rent an airplane will miss the checkpoints entirely. There are many wealthy residents of other parts of the nation who own real estate in the Lower Rio Grande Valley; and it is quite possible that some of them do not even know of the Sarita checkpoint's existence because they fly into and out of the Valley by private aircraft.

In view of the foregoing, it would certainly appear that, as heretofore contended, the Ninth Circuit was eminently correct when it held in *Martinez-Fuerte* that the checkpoints intolerably interfere with the rights of the innocent (514 F.2d at 322).

B. Governmental needs are not well served by the checkpoint.

The Government apparently will seek to constitutionalize its asserted authority to stop and question, without warrant or suspicion, each and every motorist passing through the checkpoints on the ground the checkpoints are absolutely essential and indispensable to the effective enforcement of the immigration laws of the United States.[21] It likely will be contended that the checkpoints are much more important in apprehending illegal aliens and deterring them from coming into the country than are the roving patrols. The Government will say that there are vast numbers of such illegal aliens now within the United States, estimating the figure to be as many as 10 to 12 million, with 85

[21]See *United States v. Martinez-Fuerte*, Supreme Court No. 74-1560, Brief for the United States at 17-28.

percent having come from Mexico (see *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2579). No other method, it will be contended, can accomplish the vital results achieved by the checkpoints which are strategically located away from the Mexican border.

In considering the Government's probable contentions regarding law enforcement needs, it is appropriate to point out that, though the Border Patrol has been operating checkpoints for many years,[22] the Immigration and Naturalization Service's estimate of illegal aliens in the country rose from one million in 1972 to as many as 10 to 12 million in 1974 (see *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2579). These figures speak for themselves and are alone sufficient to create a very substantial doubt as to the claimed efficiency and necessity of the checkpoints if, as contended, the checkpoints are indeed the backbone of the Border Patrol's enforcement efforts. Mr. Justice White's point was well taken when, in his concurring opinion for the *Brignoni-Ponce* and *Ortiz* cases, he commented on the Government's lack of success in intercepting illegal aliens as follows:

> The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial (95 S.Ct. at 2598).

[22]In *Fernandez v. United States,* 321 F.2d 283 (C.A. 9), it was reported that a checkpoint had been in operation for at least 31 years (*id.* at 286).

In fiscal 1973 the number of deportable aliens apprehended by the Border Patrol, which makes the great majority of such apprehensions, was 498,123.[23] Only approximately 12 percent of all apprehensions of deportable aliens throughout the nation are made at checkpoints; and in fiscal 1973 about 55,300 deportable aliens were apprehended in the United States by Border Patrol agents working the traffic-checking operations.[24] When these 55,300 apprehensions are compared to the asserted 10 to 12 million illegal aliens estimated to be in this country in 1974, most of whom must have passed through or, in some way, gone around or over the checkpoints,[25] it becomes clear that the Government's claim for the checkpoints' efficiency is not well-founded, especially if it is taken into consideration that in 1973 the Border Patrol was exercising its claimed right to open the trunks of vehicles without probable cause for such searches.[26]

The Border Patrol's statistics further reveal that in an eight-day period in June of 1974, at the San Clemente checkpoint, 171 out of 145,960 vehicles were found to

[23]See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

[24]*Id.* at 2596.

[25]"These aliens are increasingly found in virtually all regions of the country and in all segments of the economy" (*id.* at 2592).

[26]Since such searches were held unlawful in 1975 by *United States v. Ortiz, supra,* 95 S.Ct. 2585, the prior limited effectiveness of the checkpoints must surely have dropped to an even lower level.

contain deportable aliens (see *United States v. Martinez-Fuerte, supra*, 514 F.2d at 313-314). This is a ridiculous efficiency ratio of about 0.12 percent, and shows conclusively that the checkpoint operations are like sifting a mountain to recover a pinch of gold dust. Furthermore, there were 820 vehicles that during this same period "broke the pattern" and consequently were diverted for the much more intrusive "secondary" inspection at the San Clemente checkpoint; but only about 21 precent were found to contain deportable aliens, again a shockingly low figure (*ibid.*).

If the checkpoints are not achieving their purpose, it is not due to any lack of diligence or devotion to duty on the part of the Border Patrol personnel. The Border Patrol does a commendable job, but it has been asked to do more than can in fact be accomplished with the means provided. In an effort to accomplish this task, it has turned to the checkpoints. This is not at all a unique occurrence in the field of law enforcement. For law enforcement officials, when more is demanded of them than is possible to deliver, often turn to methods which they attempt to justify on the basis of the hoped for results without sufficient weight being given to constitutional considerations. In the area of law enforcement the desire to achieve a praiseworthy goal can not be enough. The freedoms which flow from the Constitution are secure only if the police are also policed; and in regard to this paradoxical but vital principle of our system of constitutional government, Mr. Justice Powell, speaking for the Court, in *United States v. United States District Court*, 407 U.S. 297, said:

> But those charged with this investigative and prosecutorial duty should not be the sole judges of

> when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech (*id.* at 317, footnote omitted).

When the Border Patrol is provided with sufficient money, men and materials, the Mexican border can be substantially sealed at the physical boundary by the "line watch." History reflects that in the fairly recent past our nation effectively secured this same physical boundary from much deadlier and more cunning intruders than the ones who now violate it.[27] But in order to achieve the desired effectiveness, there obviously would have to be an increase in the funds appropriated for recruiting, training and maintaining

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[27]In 1916 a long revolution had reduced Mexico to starving misery. A state of virtual anarchy prevailed in the north where a bandit-turned-revolutionary calling himself Pancho Villa (Doroteo Arango) held sway. The bloody bandits of northern Mexico stealthily raided across the international boundary with such increasing frequency and ferocity that no citizen residing in the United States border country could consider himself safe. After many massacres of its border-area residents, the United States finally determined to solve the bandit problem. The army along this boundary was appropriately reinforced to the extent that there were 50,000 soldiers stationed at each of three border positions, Brownsville, El Paso and Nogales. In time the integrity of the boundary was secured against these surreptitious intruders. See *Horgan, Great River, The Rio Grande in North American History* (1954), volume 2, pages 904-936. By 1920 the number of men guarding the border had been reduced to 20,000. See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

additional Border Patrol agents.[28] The amount of money required for this objective may not be inconsequential; however, the cost could not remotely compare to some of the expensive projects this nation has heretofore undertaken, such as, for example, giving financial aid to a throng of foreign countries.

Another possible means of controlling the flow of illegal immigrants would be to offer a substantial reward for information leading to the apprehension of an illegal alien. A reward of $50.00 per alien might have little impact on the alien problem but one of $500.00 per alien could definitely have a very substantial impact thereon, and it would also have a strong deterrent effect upon those considering a trip to the United States without official permission.[29] Granted, this too would be expensive; but as was said by the Court in the *Martinez-Fuerte* case, "[n]onetheless, the mere fact that protecting a constitutional right will impose a heavy burden on the federal fisc is not a proper ground for our failing to protect that right" (514 F.2d at 318-319).

The foregoing examples concerning the methods which could solve the illegal alien problem, if we are

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[28]There are, incredibly, only about 1,360 Border Patrol agents assigned to the 2,000 miles of southern border. This is about 80 percent of the nation's entire force; hence it is apparent that many more agents are needed by the Border Patrol. See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

[29]For an example of the reward approach that is perhaps somewhat limited in scope, see 18 U.S.C. 3056 which authorizes the Secret Service to offer and pay rewards for services ~~leading to~~ information looking toward the apprehension of criminals.

but willing to pay the necessary price, are certainly not exhaustive. But there also appear to be certain legislative measures, which, if adopted, would clearly prove to be more effective than the checkpoints and which would cost this nation much less money to implement than would the foregoing suggestions. A statute making it unlawful to employ illegal aliens and providing adequate criminal sanctions for its violation, is the most promising horse in this stable. It is ridiculous to expect to solve a problem involving millions of people when we are not even willing to punish the problem's real creators—the employers who directly or indirectly lure these unfortunate people to this country and sustain them when they arrive. The people most adversely affected by the checkpoints are those who live in the strip of this nation between the border and the checkpoints, yet the problem is not of their making. The aliens in question come from the south of this area and simply pass through it on their way to the north, while the residents of the border area are the ones primarily called upon to pay the checkpoints' constitutional "toll," supposedly to protect the other parts of the nation where the illegal aliens find succor. This irony seems more than slight. We should punish the guilty and let the innocent forego the checkpoints.

Another piece of legislation which, if enacted, could prove very helpful in solving this problem is one requiring the seizure and forfeiture of vehicles used to knowingly transport illegal aliens. No doubt the statutes now existing which authorize the seizure and forfeiture of vehicles used to carry narcotics and other unlawful items have proven helpful to enforcement of laws in

that area.[30] Again, these examples of possible legislation are certainly not exhaustive but illustrate that the national interests involved in enforcing the immigration laws can be solved in other and better ways than by impinging on constitutional guarantees.

None of the foregoing is to imply that the Border Patrol would be rendered powerless by the closing of its checkpoints. On the contrary, it has other weapons such as, for example, the employment of electronic detection equipment at or very near the physical boundary.[31] In this regard, it can be observed that in fiscal 1973 there were 175,511 deportable aliens apprehended throughout the nation by Border Patrol agents assigned to the "line watch" at the physical boundary, while, as stated previously, only 55,300 deportable aliens were apprehended by Border Patrol agents working traffic-checking operations.[32] It therefore appears that the "line watch" is in fact the backbone of the Border Patrol's defense against illegal aliens, not the checkpoints. Borrowing from the wisdom of another combative, but far less serious activity, it can be observed that every football player who has tried to catch an illusive runner in an open field knows that a good line is the best defense.

The argument that a particular police procedure is absolutely necessary to protect a national interest in law enforcement is always advanced when the particular procedure is attacked on constitutional grounds. For

[30]See 19 U.S.C. 1595a(a); 21 U.S.C. 881(a)(4); and 49 U.S.C. 782.

[31]See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2594.

[32]*Id.* at 2594, 2596.

example, in *Almeida-Sanchez v. United States, supra,* 413 U.S. 266, the Government argued that the only feasible means of apprehending illegal aliens who surreptitiously entered this country was by the Border Patrol's roving patrols (*id.* at 276, concurring opinion of Mr. Justice Powell). Now the Government maintains that the checkpoints have always been the single most important element of this enforcement program.[33] But the facts do not support the Government's present position; instead, they clearly indicate that the national interests are not well served by these checkpoints.

C. The checkpoint is a cancer in our free society, and this malignancy should be excised before it spreads.

Consideration has been given to the intrusions which are still being perpetrated daily at the checkpoints; but if a true balance is to be made between the good and the evil of the checkpoints, one extremely important consideration must still be placed on the judicial scales. For a highly compelling reason why the permanent checkpoints should now be held unconstitutional is that they possess great and inherent potential for political abuses. (It is not herein suggested in any way that the checkpoints have already been so used.)

The permanent checkpoints are Orwellian devices with great potential for population manipulation and

[33]See *United States v. Martinez-Fuerte,* Supreme Court No. 74-1560, Brief for the United States at 19-20.

governmental oppression. The abuses to which they could readily be adopted if they ever came under the control of a domineering political party bent on perpetuating itself in power should be justification enough to invoke constitutional protections.[34] There is little doubt that the permanent traffic checkpoint is, and has long been, one of the traditional tools employed by totalitarian governments.

In considering the danger to this nation implicit in the use of the checkpoint for any purpose, however noble, the thoughts of the eloquent jurist, Judge Learned Hand, which he ably expressed in *United States v. Kirschenblatt*, 16 F.2d 202 (C.A. 2), appear particularly pertinent:

> Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition (*id.* at 203).

These fixed and permanent policing devices should not be considered only in terms of the Mexican border. The checkpoint bell can toll for the rest of the United States. For how would it be logical, reasonable and fair to hold that checkpoints are constitutional, but only if located in southern Texas, southern New Mexico,

[34]Of course, if any dominant political party should ever choose the nefarious path of systematic political repression, the checkpoints would be only one arrow in its heinous quiver. But this arrow would be there, ready to be strung to the bow of repression.

southern Arizona and southern California? The illegal alien problem is located in the much more prosperous parts of this nation where the great industry dwells. The area of the Mexican border is not the land of milk and honey for the illegal alien. The milk is in Detroit, and the honey is in Chicago.

Also, these fixed and permanent policing devices should not be considered only in terms of the Border Patrol. What is sauce for the goose surely must be sauce for the gander. Perhaps the Internal Revenue Service could determine that a certain large metropolitan area is a hotbed for income tax evasion. Why not then set up permanent checkpoints at strategic locations selected by high-ranking Internal Revenue officials to ask the occupants of every vehicle their names, if they filed income tax returns for the three previous years and, if so, where? (Of course, the model and make of the stopped car could be noted for comparison with the driver's recent tax returns, if his returns are found.) Or perhaps the local police in a large city might determine that a particular district was overrun with prostitutes. Could permanent checkpoints be set up, either on streets or on sidewalks or on both, to inquire as to the occupation of each person passing? And if the person questioned happened to be a woman with certain observable physical and grooming characteristics, could she then be referred to "secondary" for a more extensive investigation?

The foregoing proposals obviously should be considered unconstitutional. Likewise, the routine checkpoint stop, visual search of the vehicle's interior and a "brief question or two" by the Border Patrol, all without warrant or specific suspicion, should be held to violate

Fourth Amendment guarantees. If Border Patrol checkpoints are held constitutional, then a number of other police organizations, charged with enforcing what some might consider more vital and important criminal laws than those in the immigration field, will undoubtedly cast covetous eyes on the permanent checkpoints; and in the normal and inevitable course of events, other police organizations will start to employ these fixed devices with increasing frequency in their own operations. In this way we could slowly but surely become a nation infested with numerous checkpoints aimed at impeding sundry types of criminal activity, and this would indeed be a sad eventuality for our freedom.[35]

If the illegal alien problem is of great importance to the existence and welfare of this nation, then we must rid ourselves of it. But this riddance should be achieved at the cost of money and materials and not at the cost of our personal liberties. The checkpoint is a cancer in our free society. This malignancy should be excised before it spreads.

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[35]It is not suggested herein that traffic stops to enforce state license requirements or safety standards could not be constitutional if conducted within the bounds of reasonable limits. However, even such license and safety checks should not be accomplished by ringing a selected area with permanent checkpoints which operate on a constant and continuing basis, month after month and year after year, for this would move such operations from the realm of reasonable preventive police action into the domain of oppressive governmental interference with such an area's unfortunate traveling citizens. Also, it is not suggested herein that roadblocks could not lawfully be employed by police to attempt to apprehend fleeing criminals in an exigent situation such as a kidnapping or a bank robbery. But when such a temporary emergency is over, the roadblocks should promptly be removed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals affirming the conviction of Petitioner should be reversed.

Respectfully submitted,

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